

2001

Utah Golf Association, Inc. v. City of North Salt Lake : Brief of Appellee

Utah Supreme Court

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UTAH GOLF ASSOCIATION, INC.,
a Utah non-profit corporation,

V.

Defendants/Appellants.

Case No. 20010928SC

**APPEAL FROM A JUDGMENT AND UNDERLYING ORDERS
OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY,
THE HONORABLE TIMOTHY R. HANSON**

Attorney for Appellants

Attorney for Appellee/Cross-Appellant

JUN 24 2:02

Complete List of All Parties in District Court

All parties in the district court are listed on the caption of the case.

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Statement of Jurisdiction

Jurisdiction in this Court is proper under Utah Code Ann. § 78-2-2 and Utah Constitution, Article VIII, Section 3.

Issues Presented for Review

The UGA is dissatisfied with the statement of the issues of North Salt Lake.¹ Two of the major issues raised by North Salt Lake are: 1) whether the agreement between the parties was ultra vires and unenforceable; and 2) whether North Salt Lake breached the agreement because the time for its performance had not yet arrived. North Salt Lake takes the position that these issues are legal issues and are reviewed for correctness without deference to the decision of the trial court.

However, these issues are affirmative defenses to the breach of contract action brought by the UGA. They address the liability of North Salt Lake under the agreement. This liability was the subject of the UGA's motion for summary judgment filed on May, 4, 2000. The trial court issued a memorandum decision on July 14, 2000 determining that North Salt Lake breached the contract between the parties.

North Salt Lake did not allege either of these affirmative defenses in its Answer and neither were they raised during the summary judgment proceeding on liability. It chose to wait for six months, until January 17, 2001, to ask the court to reconsider its liability in light of these arguments that were raised for the first time. North Salt Lake also filed a new affidavit of the developer who originally conveyed the subject building lot with the deed

¹ Both of the Appellants are jointly referred to herein as "North Salt Lake."

restrictions. North Salt Lake justified its delay in raising these affirmative defenses by claiming that the developer's willingness to lift the deed restrictions was newly discovered evidence. Yet, at the time North Salt Lake filed its motion for reconsideration and the developer's affidavit, witness exhibit lists for trial had already been exchanged pursuant to court order and the developer was not listed as a witness; the discovery cut-off was about to pass; and the court would shortly hold a telephone pre-trial conference setting the trial date. R. 237.

The trial court determined that North Salt Lake's motion for reconsideration should not be granted based on the merits of its argument and also based upon the fact that North Salt Lake had plenty of opportunity to raise these affirmative defenses six months earlier, during the original summary judgment proceeding on liability and chose not to do so. R. 423 & 424. The court determined that motions for reconsideration, to the extent that they exist, do not exist for the purpose of continually raising legal issues that should have been raised in an original motion. R. 424. The court's refusal to grant the motion for reconsideration under these circumstances should be measured by the abuse of discretion standard, rather than the de novo review standard proposed by North Salt Lake. Timm v. Dewsnup, 921 P.2d 1381, 1386 & 87 (Utah 1996); and Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1312 (Utah 1994).

The UGA has crossed appealed the issue of whether the trial court erred in declining to award its moving expenses incurred after it was evicted. The trial court determined that the UGA did not mitigate its damages because it should have signed a 20 year lease extension

and then sued North Salt Lake for its failure to convey the building lot. R. 443. Whether the duty to mitigate damages includes agreeing to the 20 year extension without the bargained for building lot is a conclusion of law and was so identified by the trial court. R. 529. The court found that but for the failure of North Salt Lake to convey the building lot, a 20 year extension to the lease would have been successfully negotiated. This was a factual finding, but the application of the doctrine of mitigation of damages to this finding was a conclusion of law that is reviewed for correctness. Lysenko v. Sawaya, 7 P.3d 783, 787 (Utah 2000).

Determinative Constitutional Provisions, Statutes, Ordinances and Rules

The case is based upon common law doctrines and principals of contract. There are no determinative constitutional provisions, statutes, ordinances or formal rules.

Statement of the Case

A. Nature of the case.

This is a breach of contract action based upon the lease of office space to the UGA by North Salt Lake at the City's Eaglewood golf course club house. As an inducement for the UGA relocating its offices and the Utah Golf Hall of Fame to the club house and as an inducement to entering into the lease, North Salt Lake agreed to convey fee title to the UGA in an 18,975 square foot building lot that was just east of the club house parking lot, fronting on a residential street next to the adjacent, developing subdivision. The initial term of the lease was five years. In order to obtain the lot, the UGA had to sign a 20 year extension of the lease.

As the end of the initial lease approached, the parties started negotiations for a long-

term lease. During these negotiations, it became clear to the UGA that North Salt Lake did not hold fee title to the building lot, but held title subject to significant use restrictions that made it impossible to sell the lot to third parties. In addition, the lot was 17,768 square feet, not the 18,975 square feet that North Salt Lake was obligated to convey. The UGA stood ready to sign a 20 year lease but required the City to obtain release of the use restrictions and stand ready to deed “fee title” in the 18,975 square foot building lot to the UGA. North Salt Lake did not obtain release of the use restrictions on the lot and did not obtain the additional 1,207 square feet that it agreed to convey. The initial lease expired and the UGA became a month-to-month tenant. Since the UGA would not enter into a new lease without fee title in a lot of correct size, North Salt Lake terminated the tenancy of the UGA and evicted it from the offices.

B. Course of proceedings and disposition in the trial court.

The UGA sued North Salt Lake for breach of the lease. On May 4, 2000, the UGA moved for summary judgment on the issue of liability. On July 14, 2000, the trial court ruled that North Salt Lake breached the lease by not being able to transfer fee title in an 18,975 square foot building lot to the UGA. R. 220.

On November 9, 2000, the trial court issued a Notice of Telephone Conference that listed cut-off dates. R. 237. These dates included an exchange of witness and exhibit lists for trial by January 5, 2001, and a deposition cut-off of January 31, 2001. On January 17, 2001, North Salt Lake moved for reconsideration of the summary judgment granted by the court six months earlier. The motion was based upon a new affidavit of the developer who

conveyed the building lot to North Salt Lake with the use restrictions. The developer was not listed as a witness on North Salt Lake's witness list. The UGA opposed the motion for reconsideration and moved to strike the affidavit. On May 15, 2001, the court denied the motion for reconsideration on the merits and also denied the motion because North Salt Lake failed to raise the issues at the time of the original summary judgment on liability. R. 421.

Trial was held on May 30, 2001. R. 428. The court issued its findings of fact and conclusions of law on August 10, 2001 and judgment on November 14, 2001. R. 525 & 549.

C. Statement of facts.

1. The UGA is an organization representing amateur golf in the state of Utah. R. 526.

2. North Salt Lake is a municipal corporation. R. 526.

3. The Municipal Building Authority is a municipal building authority created by North Salt Lake. R. 526.

4. North Salt Lake and the Municipal Building Authority constructed the Eaglewood golf course and a club house. R. 526.

5. On or about March 31, 1992, the parties entered into an agreement entitled "Office Use Agreement," referred to herein as the "Agreement." R. 526.

6. The Agreement included a "First Addendum to Office Use Agreement," referred to herein as the "First Addendum." R. 526.

7. On or about January 3, 1994, the parties executed a "Second Addendum to Office Use Agreement," referred to herein as the "Second Addendum." R. 526.

8. The parties agreed within the Agreement and the First Addendum that the UGA would lease its offices at the club house from North Salt Lake for a term of five years, and at the end of that term would enter into a 20 year lease at the base rent with a 3% cost of living increase for each year. The Second Addendum changed the amount of rent, to an amount agreed upon between the parties. R. 527, and Second Addendum, R. 34.

9. As an inducement for the UGA relocating its offices and the Utah Golf Hall of Fame to the club house; as an inducement to entering into the agreements; and as an inducement to enter into a 20 year lease extension; North Salt Lake agreed to convey fee title to the UGA in an 18,975 square foot building lot that was just east of the club house parking lot, fronting on a residential street next to the adjacent, developing subdivision. R. 527.

10. Unknown to the UGA and to North Salt Lake at the time of the Agreement and the Addendums, neither of the defendants owned fee title to the building lot. Title was conveyed to North Salt Lake in August of 1997, by Special Warranty Deed. The title conveyed to North Salt Lake was not “fee title”, as represented in the First and Second Addendums. Rather, it contained significant restrictions to the use and transfer of the property. In addition, the size of the lot was 1,207 square feet smaller than the size of the lot that North Salt Lake was obligated to convey. R. 140, 157, 161 & 166.

11. As the end of the initial lease approached, the parties started negotiations for a 20 year extension of the lease. R. 527.

12. During these negotiations, it became clear to the UGA that North Salt Lake did not hold fee title to the building lot as represented in the First and Second Addendum, but

held title in a smaller lot, subject to significant use restrictions that made it impossible to sell the lot to third parties and obtain the highest value for the lot. R. 527.

13. The UGA desired to exercise its rights under the First Addendum and enter into a 20 year extension of the lease. However, the UGA required the City to obtain release of the use restrictions in the deed and stand ready to deed “fee title” in the building lot to the UGA that could be marketable to third parties. R. 527.

14. Between March, 1999 and December, 1999, the parties tried to resolve the problem caused by the use restrictions on the lot. R. 527. Also, see letters exchanged between the parties, trial exhibits 7 - 14.

15. North Salt Lake did not obtain release of the use restrictions on the lot. R. 528.

16. The initial term of the lease expired and the UGA became a month-to-month tenant. R. 528.

17. North Salt Lake was agreeable to entering into an extension of the lease and continue to negotiate on the lot. The UGA required North Salt Lake to be able to convey the lot free and clear from the use restrictions before entering into a new lease. R. 528. See UGA letter of December 8, 1999, trial exhibit 13.

18. But for the use restrictions on the lot, the parties would have successfully negotiated a 20-year extension. R. 528.

19. Since the UGA would not enter into an extension of the lease without fee title in the lot, North Salt Lake terminated the month-to-month tenancy of the UGA and evicted the UGA from its offices on December 31, 1999. R. 528.

20. The UGA complied with the eviction notice and vacated its offices at the Eaglewood golf course. R. 528.

21. The UGA incurred costs in moving its offices, salaries for employees involved with the move, expenses associated with relocating its telephone system, costs of new stationary with a new address, and miscellaneous expenses associated with the move, primarily the cost of items that had to be left at the club house or could not be used at the UGA's new site. R. 528.

22. The moving expenses totaled \$4,087.27, and are set forth on the statements from Mesa Moving and Storage and Midwest Office. Trial exhibit 19. The cost of moving the telephone system totaled \$2,102.69, and is set forth within the statements from Western Communications. Trial exhibit 19. The cost of printing new stationary, envelopes, cards and other necessary items totaled \$4,815.53, and is set forth in the statements from Production Graphics. Trial exhibit 19. These costs total \$11,005.49.

Summary of the Argument

1. It was not an abuse of discretion for the trial court to deny the untimely motion for reconsideration. The motion was based upon two affirmative defenses that were not raised in the original answer or in the first summary judgment proceeding that directly addressed the issue of liability which was at the heart of these defenses.

2. The promise to convey the building lot to the UGA was a major part of the agreement between the parties. It was supported by consideration and was not an unenforceable gift of municipal property.

3. The City owned the building lot and had full power and authority to convey the lot to the UGA. The Municipal Building Authority also had full power and authority to convey the lot to the UGA, but this issue is irrelevant because it never owned the lot.

4. North Salt Lake breached the contract by misrepresenting that it owned the building lot when it did not own the lot, by not conveying the lot when the UGA stood ready and willing to enter into a lease extension, by telling the UGA that it had to sign a lease extension and then deal with the developer to obtain clear, fee title to the lot, and by evicting the UGA when the UGA told it to perform its part of the contract and convey the lot.

5. The UGA was released from its duty to enter into a 20 year lease extension because of North Salt Lake's breach of the agreement.

6. The First Addendum controlled the rent terms of the 20 year extension and the Second Addendum was an unenforceable agreement to agree because it provided that the City could charge whatever it wanted for rent during the extension.

7. By awarding the UGA damages in the amount of the fair market value of the building lot, the trial court put the parties in the same position as if the contract to convey fee title in the lot had been fully performed. This was the correct measure of damages.

8. The trial court erred in not awarding the UGA its costs of moving caused by its wrongful eviction.

Argument

A. The Trial Court did not Abuse its Discretion by Denying North Salt Lake's Motion for Reconsideration.

On May 4, 2000, the UGA moved the trial court for summary judgment on liability

for breach of contract. R. 99. North Salt Lake opposed the motion. R. 164. The court announced its decision on July 14, 2000, granting the motion for summary judgment on liability. R. 220. The UGA certified the case for trial on October 4, 2000. R. 229. On November 9, 2000, the court set cut off dates. R. 237. The cut off date for the witness list and exhibit list for trial was January 5, 2001. Id. The cut off date for depositions was January 31, 2001. Id.

On January 17, 2001, North Salt Lake moved for reconsideration of the court's decision on summary judgment on liability. R. 253. This was six months after the initial decision on liability, and the motion was filed after the witness list and exhibit list for the trial were exchanged and only two weeks before the deposition cut off.

The motion for reconsideration raised two new issues: 1) the lease was ultra vires and not enforceable; and 2) the accompanying affidavit of the developer indicated that she would have conveyed fee title to the UGA Property if the City would have only asked, which meant that the City could have performed and conveyed fee title at the time the UGA signed a 20 year lease extension. R. 253. Both of these defenses were affirmative defenses to liability that should have been raised six months earlier at the time of the initial summary judgment proceeding on liability. North Salt Lake chose to not raise them at the earlier date.

The new witness, the developer, had no relevant evidence to add to the court's decision on liability. She was not even on the City's witness list for trial. R. 241. Her affidavit simply states that she would have conveyed fee title to the UGA Property to the City if it would have simply asked. R. 320. However, the affidavit did not change the fact that:

1) North Salt Lake represented that it held fee title in the UGA property in the written documents, which representation was false, R. 27; 2) the primary inducement to the UGA to leave its corporate offices and relocate to the City's Eaglewood golf course was the promise of fee title in the Property, R. 27 & 527; 3) prior to expiration of the initial term of the lease, the parties discovered that North Salt Lake did not have fee title in the UGA Property, R. 527; 4) Between March, 1999, and December, 1999, the parties attempted to negotiate a resolution to the problem, R. 527 and letters between the parties, trial exhibits 7 - 14; 5) North Salt Lake did not obtain fee title in the Property, R. 528, and Special Warranty Deed from the developer, R. 140; 6) the City took the position that it would not meet its contractual obligation and obtain fee title for the UGA and it was the UGA's responsibility to go to the developer and obtain fee title, Transcript of trial testimony of Scott Gardner, North Salt Lake Director of Golf and Recreation, p. 94, R. 565; and testimony of Colin Wood, North Salt Lake City Manager, p. 131, R. 565; 7) the UGA stood ready and willing to sign a 20 year lease extension R.528, and UGA letter of December 8, 1999, trial exhibit 13; and 8) the City evicted the UGA when the UGA continued to demand that the City perform its contractual obligation and convey fee title to the UGA Property, R. 528 and eviction notice, trial exhibit 15.²

A trial court's decision to grant or deny a motion to reconsider a summary judgment

² The affidavit is suspect. Why would the developer change her mind and state that she would have conveyed the UGA Property in fee, without use restrictions, when she conveyed it to the City in 1997 with carefully worded use restrictions that prevented the UGA from reselling the property? The UGA has since been evicted and cannot take advantage of the developer's change of heart. Further, the developer has not lifted the deed restrictions and they exist today. She only states that she would have.

is within the discretion of the trial court, and this court will not disturb the decision absent an abuse of discretion. Timm v. Dewsnap, 921 P.2d 1381, 1386 & 87 (Utah 1996). The trial court determined that North Salt Lake's new legal arguments were affirmative defenses to the original summary judgment and could have and should have been raised at that time. R. 423 & 24. The court also agreed with the UGA that the affidavit of the developer should be stricken. R. 422. The fact raised by the developer in her affidavit that she would have released the deed restrictions if the City had only asked did not change the fact that North Salt Lake made no effort to obtain such a release, told the UGA that it had to deal with the developer and then evicted the UGA when the City could not provide fee title. Further, the affidavit does not address the fact that the lot was short 1,207 square feet from the lot agreed to be conveyed. The developer's affidavit was something that could have been obtained for the first summary judgment six months earlier, and its content was irrelevant.

The court should sustain the trial court's decision to not reconsider the summary judgment based upon the arguments that the lease was ultra vires and that the developer would have lifted the deed restrictions. The trial court also ruled that these arguments failed on the merits. R. 424 & 25. If this court decides to consider these issues on the merits, the UGA has briefed them below.

B. North Salt Lake and the Municipal Building Authority Waived the Defenses that the Agreement was Ultra Vires and that the Developer would Convey Fee Title to the UGA Property.

North Salt Lake and the Municipal Building Authority answered the complaint on February 29, 2000, but did not raise the two legal issues that they presented in their motion

for reconsideration as affirmative defenses under Rules 12(b) and 8(c) of the Utah Rules of Civil Procedure. Rule 12(b) provides that any defense shall be asserted in a responsive pleading. Rule 8(c) provides that a responsive pleading must set forth any matter “constituting an avoidance or affirmative defense.” The defenses that the agreement was ultra vires and that the developer would have conveyed the UGA Property free of the use restrictions were clearly “affirmative defenses” and an “avoidance” because they deny liability not because the allegations of the complaint are not true, but because the legislature and the Utah Constitution are alleged to have prohibited such contracts as ultra vires and because the developer is claimed to have stood ready to convey fee title to North Salt Lake. Therefore, to preserve these defenses, they had to be raised in the defendants’ answer. Golding v. Ashley Central Irrigation Co., 793 P.2d 897, 899 (Utah 1990). They were not raised as affirmative defenses and the UGA objected to North Salt Lake raising them in its motion for reconsideration. The UGA also moved to have them and the affidavit of the developer stricken.

Not only were they not raised as affirmative defenses, the defendants affirmatively alleged in their Answer that their execution of the documents was “taken under proper authority of law.” Answer, Third Defense, R. 95. The defendants clearly waived their right to assert the ultra vires argument by not raising it as an affirmative defense and also by expressly disclaiming the defense in the Answer.

C. The Agreement Requiring North Salt Lake and its Municipal Building Authority to Convey the Building Lot was not an Unenforceable Gift.

North Salt Lake argues that the agreement to convey the fee title in the UGA Property,

the building lot, was a gift, and therefore an unenforceable ultra vires agreement. The conveyance of fee title was not a gift. It was, rather, part of a lease with the UGA, which is the oldest and largest organization of amateur golfers in the state of Utah and Utah's representative with the United States Golf Association, the governing body of the sport.

This agreement is a complete package and cannot be divided into parts. North Salt Lake, however, argues that it should be divided into two parts that are distinct from each other and designed to exist on their own. North Salt Lake argues that the first portion is the lease of the UGA office space and the second portion is the agreement to convey the building lot, which North Salt Lake calls a "gift."

The Office Use Agreement and the First Addendum were signed at the same time, March of 1992, before the club house was constructed. The basic purpose of the Agreement was lease of office space to the UGA for five years with payment of \$30,300.00 annual rent. R. 11 & 12. To induce the UGA to leave its current offices and move its operations to North Salt Lake's Eaglewood club house, the City also agreed:

1. To lease an additional 888 square feet at no cost to house the Utah Golf Hall of Fame (R. 27);
2. To allow the UGA to hold two weekday tournaments each year and not charge greens fees or cart fees for the tournaments (R. 27);
3. To allow the UGA to use the driving range without charge for two hours per week to train junior golfers (R. 27); and
4. To convey fee title in an adjacent 18,975 square foot building lot to the UGA

that was expressly designated in the documents as the “UGA Property” (R. 27 & 28).³

North Salt Lake now designates these items as “freebies” in its brief. However, they were never called “freebies” by the parties in the documents or in their testimony. They were an integral part of the Agreement, without which the UGA would not have relocated or agreed to pay rent to North Salt Lake.

If North Salt Lake can convince the Court that these items were not part of the lease, but were “freebies”, then it hopes that such “freebies” will be ultra vires under Article VI, § 29 of the Utah Constitution and the cases of Sears v. Ogden City, 553 P.2d 118 (Utah 1975); Municipal Building Authority of Iron County v. Lowder, 711 P.2d 273 (Utah 1985); and Salt Lake County Commission v. Short, 985 P.2d 899 (Utah 1999). However, each of these cases dealt with actual gifts of municipal assets. The Sears case involved the gift of city land to the local school district. The Lowder case addressed the gift of a county jail. The Short case concerned cash contributions to charities. None of these cases involved the bargained for exchange of property and lease of office space for the agreement to relocate an organization’s operations and the payment of \$25,000.00 per year in rent.

1. Public Policy requires that North Salt Lake not be allowed to escape its obligation to honor the agreement with the UGA.

The contract that is at issue is a detailed written agreement that was negotiated

³ The Second Addendum to Office Use Agreement was signed two years later, after the club house was built. R. 31. Since the final design of the club house was changed during the construction, the amount of space leased by the UGA was reduced slightly and the rent was reduced to \$25,000.00 per year. R. 31 & 32. The Second Addendum also allowed the City to share in any income from the UGA’s two annual tournaments and driving range use. R. 33. The Second Addendum retained the duty to convey the UGA Property to the UGA, but changed the agreement concerning the amount of rent for future extensions of the lease. R. 34.

between North Salt Lake and the UGA over several months. Both of the parties were happy with its terms. Thus, they signed it. After five years of both party's performance under the contract, North Salt Lake discovered that it did not own fee title to the UGA Property and could not perform its agreement to convey such fee title. It started looking for ways to escape its obligations under the agreement. See affidavit of North Salt Lake Mayor James W. Dixon, para. 8 & 9, R. 161. North Salt Lake also discovered that it could obtain higher rent than the rent that the UGA was obligated to pay. See p. 23, note 2 of North Salt Lake brief. North Salt Lake breached the agreement by refusing to convey the UGA Property, evicted the UGA and rented the office space to third parties for increased rent. North Salt Lake now attacks the contract as ultra vires and asks this Court to absolve it of liability for its breach of the lease.

In each of the three cases cited by North Salt Lake, the government parties to the contracts or gifts supported the contracts or gifts. In the Sears case, Ogden City favored the gift of the real property to the school district. Sears v. Ogden City, 553 P.2d at 118. Likewise, in the Lowder case, the Iron County Municipal Building Authority sought a declaratory judgment to validate the transaction that included a gift of the old county jail. Municipal Building Authority of Iron County v. Lowder, 711 P.2d at 275. In Short, the charitable contributions were supported by the Salt Lake County Commission who made the contributions. Salt Lake County Commission v. Short, 985 P.2d at 900. In each case, the gifts were challenged by third parties to the gifts or contracts.

In the present case, the lease is not being challenged by third parties. It is being

attacked by North Salt Lake, the party who misrepresented its ownership in the UGA Property, the party who could not perform under the lease because it did not own fee title in the Property, and the party who wanted to evict the UGA so that it could rent the office space for more than the UGA was obligated to pay.

This Court recently addressed an arm's length transaction between a state agency and a private company where the state agency, not a third party, attacked the contract and attempted to use Article VI, § 29 of the Utah Constitution to disavow the agreement and its duty to pay the private company. Health Services Group, Inc. v. Utah Department of Health, 40 P.3d 591 (Utah 2002). The state agency failed. Id. at 599. The Court upheld the contract and the obligation of the state agency to perform under the contract. Id.

The Court should, likewise, deny North Salt Lake's attempt to back out of its agreement with the UGA. To allow North Salt Lake to walk from its obligations under the agreement would set a precedent that a contract with a municipality can be ignored if the municipality subsequently changes its mind and does not like the terms of the contract.

2. There was consideration to support the Agreement.

North Salt Lake argues that there was no consideration for the agreement to convey the UGA Property. In support of this argument, it reasons that the \$150,000.00 in rent that the UGA paid over the six years that it occupied the club house was only consideration for the lease of the office space. The UGA would have paid an additional \$640,000.00 in rent over the extended 20 year life of the lease if North Salt Lake would not have breached the

lease and evicted the UGA.⁴

North Salt Lake ignores the fact that the contract is one agreement. The parties recognized in the body of the agreement that it was a tremendous undertaking for the UGA to leave its offices in Salt Lake City and move its operations to North Salt Lake. The First and Second Addendums to the Office Use Agreement clearly state in several paragraphs that North Salt Lake agreed to a number of inducements to convince the UGA to go to the effort and expense of moving its operations. R. 27 & 32. Some inducements were minor, such as the right to use the driving range for two hours per week for a junior golf program. One inducement, the obligation of North Salt Lake to convey fee title in the UGA Property, was major and without it the UGA would not have entered into the lease.

In order for a transfer of municipal property to meet the requirements of Article VI, Section 29 of the Utah Constitution, the transfer must be “in good faith and for adequate consideration.” Sears v. Ogden City, 553 P.2d at 119; Municipal Building Authority of Iron County v. Lowder, 711 P.2d at 282; and Salt Lake County Commission v. Short, 985 P.2d at 909. The UGA lease was negotiated over several months. There is no evidence that it was not in good faith.

⁴ North Salt Lake points out that after it decided to evict the UGA, it was able to lease the office space for more than the UGA was paying. This argument demonstrates the little importance that North Salt Lake places on written contracts. North Salt Lake misrepresented in the written documents that it owned fee title in the UGA lot. It could not convey the lot when the UGA stood ready to enter into a lease extension. North Salt Lake resolved this problem by evicting the UGA. North Salt Lake then rented the office space for more than the UGA was paying and now argues that this was evidence that the UGA paid no consideration for the conveyance of the UGA lot. This is evidence of how little the written contract meant to North Salt Lake.

North Salt Lake admits that there was consideration for the lease, but takes the position that these cases require something more than the consideration that would support contracts between private parties. These cases do not support this position. The reason that the charitable gifts were rejected in Short was that they were outright gifts. Salt Lake County argued that the charitable organizations benefited the County. Salt Lake County Commission v. Short, 985 P.2d at 910. This Court held that the benefits were too speculative to support the gifts and that the benefits must be specifically identified. Id. The reason that the gift of the land failed in Sears was because the gift was simply that, a gift, with no evidence of specific benefits flowing from the gift. The reason that the gift of the county jail failed in Lowder was that it was an outright gift given the fact that the County's right to reacquire the jail was 20 years down the road and there was a good chance that the right would not exist at that point in time under the terms of the contract. Municipal Building Authority of Iron County v. Lowder, 711 P.2d at 282.

This Court considered the level of consideration necessary to support a contract with a government agency in Healthcare Services Group, Inc. and determined that there is no higher threshold of consideration in a contract with the government than there is in contracts between private entities. Health Services Group, Inc. v. Utah Department of Health, 40 P.3d at 596. The Court stated:

“Consideration is present when there is an act or promise given in exchange for the other party's promise. Thus, there is consideration whenever a promisor receives a benefit or where a promisee suffers a detriment, however slight.”
[Citations omitted.]

Id.

The detriment suffered by the UGA and the benefit received by North Salt Lake were not “slight.” North Salt Lake obtained a tenant of good reputation in the golfing community, was paid \$150,000.00 over six years and would have been paid another \$640,000.00 for a 20 year extension of the lease, had it not decided to solve its problem with the UGA Property by evicting the UGA. The UGA suffered the detriment of moving its operations to the Eaglewood club house, paying \$150,000.00 over six years, losing the contracted UGA Property, losing what North Salt Lake claims was a below market lease, and then being forced to move its operations a second time when it was evicted.

D. The Conveyance of the UGA Property was not Ultra Vires.

North Salt Lake argues that the agreement was ultra vires because the Building Authority did not have the power to convey the UGA Property under the Utah Municipal Building Authority Act, Title, 17A, Chapter 3, or the Utah Code.

1. The City owned the UGA Property and had full power and authority to convey the property.

The Building Authority never owned the UGA Property and North Salt Lake never believed that the property would be owned by the Building Authority. North Salt Lake’s Mayor attested that he believed that the property was owned by the City at the time the Agreement with the UGA was executed. R. 161. Several years later, it was discovered that the property had not been deeded to the City and a Special Warranty Deed was obtained from the developer conveying the property to the City, not to the Building Authority. R. 161 and Special Warranty Deed, R. 140. The City, not the Building Authority, has continued to own the lot.

During the year's negotiations that took place between the City and the UGA whereby the parties sought a means to solve the problem caused by the use restrictions that the developer wrote into the Special Warranty Deed, the City never once claimed the Municipal Building Authority owned the property and its conveyance would be ultra vires to the powers of the Building Authority. See April 28, 1999 letter of North Salt Lake City Attorney; "the City's obligation to convey the property to the UGA;" and "the City shall transfer all right, title and interest the City owns in the property to the UGA". R. 145 and Exhibit 7, trial exhibits. See September 8, 1999 letter of City Attorney acknowledging the interest of the UGA in the building lot and the City's duty to reacquire the lot. Exhibit 8, trial exhibits. Even after being sued, the defendants affirmatively alleged that they had full authority under the law to enter into the obligations within the agreement. North Salt Lake Answer, Third Defense, R. 95.

North Salt Lake never intended that the UGA Property would be part of the golf course project that was the purpose of North Salt Lake's Municipal Building Authority. The City received the Special Warranty Deed in September, 1997. The sole purpose of the UGA Property was to fulfill the duty of North Salt Lake to convey the lot to the UGA in order to meet its contractual obligations under the Agreement. The golf course had been funded, designed, constructed, planted and was "growing in" in 1993, four years before the UGA Property was deeded to the City. Testimony of Scott Gardner, North Salt Lake's Director of Golf, transcript of trial, at 74. R. 565.

The first time that the City raised the argument that the Building Authority, rather than

North Salt Lake, owned the UGA Property was shortly before trial when the City asked the trial court to reconsider its prior summary judgment on liability that had been granted six months earlier.

2. Both the City and the Municipal Building Authority had the power to convey the building lot to the UGA.

The City had the power to contract and the power to purchase, hold and dispose of real property. Utah Code Ann. §§ 10-1-202 and 10-8-2. The Building Authority had the authority to acquire and hold property by any lawful means, including by “exchange,” by “purchase,” by “sale,” and by “lease.” Utah Code Ann. § 17A-3-902(1). If the UGA Property was part of the Municipal Building Authority project, both the City and the Municipal Building Authority had the express authority to enter into a lease agreement with the UGA that resulted in the rental of office space at the club house. This express authority included the “sale” or conveyance of the building lot as an integral part of the lease.

The Building Authority also had the express authority to take actions to “acquire,” “improve,” and “extend” the project. Utah Code Ann. §§ 17A-3-902(3) & 17A-3-903(1). Improving and extending a project may require the conveyance of certain portions of the project and acquisition of other areas of property in order to meet the shape, design, and purpose of the project. Improving a project could require the promise of a building lot to a recognized golf association in order to induce the association to incur the cost and effort to move its operations to the City’s golf course.

The authority of the Building Authority also included the implied authority to take the necessary actions and enter into the necessary agreements to complete and operate the

Building Authority project. Nothing in the Municipal Building Authority Act proscribed the Building Authority from making the promises that it made to the UGA. Indeed the Building Authority was a nonprofit corporation. Utah Code Ann. § 17A-3-903. Nonprofit corporations have the express authority to contract and acquire, hold and convey real property. Utah Code Ann. § 16-6a-302.

Both the express and implied authority of the Building Authority must be read in light of the Legislature’s directive that the Municipal Building Authority Act is “supplemental to all existing laws relating to the acquisition, use, maintenance, or operation of projects by public bodies,” including the authority of the City to execute the Agreement with the UGA and its duty to convey fee title in the UGA Property. Utah Code Ann. § 17A-3-914. The Legislature also recognized that the Act had to be “liberally construed” so that the Building Authority and the City could develop the projects authorized by the Act. Utah Code Ann. § 17A-3-917.

E. North Salt Lake Breached the Agreement.

The First Addendum gave the UGA two choices concerning the UGA property. The UGA could either elect to build its offices on the property or it could elect to not construct its offices on the property. First Addendum, para.4 & 5; R. 28. If it chose to build its offices, it had to give written notice of that election to North Salt Lake and provide copies of the plans for the offices. First Addendum, para.4. If North Salt Lake approved the plans, the building lot had to be conveyed to the UGA. Id.

If the UGA chose to not build its offices on the UGA property, then it had to enter into

a 20 year extension of the lease of its present office space at the same base rent with an annual cost of living increase of 3% per year. First Addendum, para.5. If the 20 year extension was entered into, fee title in the lot had to be conveyed to the UGA. Id.

As the end of the initial lease approached, the parties started negotiations for a long term lease. Findings of Fact; R. 527. The UGA desired to exercise its rights under the First Addendum and enter into a 20 year extension. Id. During the negotiations, it became clear that North Salt Lake did not hold title to the subject lot that would make it marketable to third parties because of the use restrictions in the deed to North Salt Lake from the original developer. Id. The UGA required the City to obtain release of the use restrictions and stand ready to deed “fee title” in a lot of 18,975 square feet, not 17,768 square feet, that could be marketable to third parties. Id.

Between March, 1999, and December, 1999, the parties tried to resolve the problem caused by North Salt Lake’s inability to convey such a lot. Findings of Fact; R. 527. North Salt Lake did not obtain release of the use restrictions. Findings of Fact; R. 528. The initial lease expired and the UGA became a month-to-month tenant. Id. The UGA continued to require North Salt Lake to be able to convey fee title, free and clear from the use restrictions before entering into a new lease. Id. North Salt Lake took the position that the UGA should sign a 20 year extension of the lease, not receive the fee title in the lot, and then take it on itself to go to the developer and negotiate the fee title that North Salt Lake was obligated to provide. Transcript of trial testimony of Scott Gardner, North Salt Lake Director of Golf and Recreation, p. 94, R. 565; and testimony of Colin Wood, North Salt Lake City Manager, p.

131, R. 565.

The trial court found that but for the inability of North Salt Lake to convey fee title of an 18,975 square foot lot, free and clear from the use restrictions, a 20 year extension to the lease would have been negotiated. Findings of Fact; R. 528. The UGA stood ready to perform its part of the Agreement and enter into a 20 year extension. The UGA's letter of December 8, 1999 made that fact clear. R. 148. All that the UGA required was that North Salt Lake perform its part of the agreement by conveying fee title in the lot in return for the 20 year extension. North Salt Lake simply refused to meet its part of the agreement and convey fee title. It could not do so. It did not own fee title. North Salt Lake ignored its obligations under the Agreement and told the UGA that it had to approach the developer and clear up the problem and negotiate fee title to the lot. The City solved the problem by terminating the tenancy and evicting the UGA.

This was a clear breach of the agreement. It was time to perform and the City refused to do so. The trial court called the breach an anticipatory breach which excused the UGA's performance of entering into a 20 year extension of the lease. R. 222. An anticipatory breach occurs when a party to an executory contract manifests a positive and unequivocal intent to not render its promised performance when the time arrives to perform. Hurwitz v. David K. Richards Co., 436 P.2d 794, 796 (Utah 1968); and Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 724 (Utah Ct. of App. 1990). See also Restatement (Second) of Contracts § 253 (1977).

Upon the City's breach, the UGA had three options: 1) treat the entire contract as

broken and sue for damages; 2) treat the contract as still binding and wait until the time arrived for its performance and at such time bring an action on the contract; 3) Rescind the contract and sue for money paid or for the value of the services or property furnished. Hurwitz v. David K. Richards Co., 436, P.2d at 796; and Breuer-Harrison, Inc. v. Combe, 799 P.2d at 724, n. 4. The UGA chose the first remedy, treated the contract as broken and sued for the damages of the lost market value of the lot and its costs of moving. The trial court awarded the market value of the lot, but denied the costs of moving.

1. The time arrived for North Salt Lake to perform and stand ready to convey fee title, which North Salt Lake could not do.

The UGA does not argue with the doctrine that a seller of real property has a duty to convey title at the time conveyance is required under the contract. Neves v. Wright, 638 P.2d 1195, 1198 (Utah 1981). However, North Salt Lake's argument that this doctrine absolves it from liability misses one small part of the doctrine. The time had arrived to convey the lot. The UGA stood ready to enter into a 20 year extension of the lease. R. 527 & 528 and UGA letter of December 3, 1999, trial exhibit 13. North Salt Lake could not perform its part of the agreement and convey fee title in the UGA property because it never owned such fee title even though it represented in the documents that it did. R. 527 & 528, and Special Warranty Deed to North Salt Lake from developer, R. 140. Further, the City made no effort to obtain fee title. The UGA told North Salt Lake on numerous occasions that it had to be able to convey fee title, free and clear from the use restrictions before the UGA would enter into a new lease. R. 527 & 528 and letters exchanged between North Salt Lake and the UGA, trial exhibits 7 - 14. North Salt Lake simply refused to solve the problem and go to the developer

and obtain fee title in a 18,975 square foot lot. Instead, the City took the position that the UGA should sign a 20 year lease, not receive the fee title in the lot, and then take it upon itself to go to the developer and negotiate the fee title that North Salt Lake could not provide and would not obtain. Transcript of trial testimony of Scott Gardner, North Salt Lake Director of Golf and Recreation, p. 94, R. 565; and testimony of Colin Wood, North Salt Lake City Manager, p. 131, R. 565.

The trial court found that but for the inability of North Salt Lake to convey fee title, free and clear from the use restrictions, a 20 year lease would have been negotiated. Findings of Fact; R. 528. In order to resolve the problem, North Salt Lake terminated the tenancy of the UGA and evicted the UGA from its offices on December 31, 1999. *Id.* Over one year after North Salt Lake evicted the UGA, the City obtained an affidavit from the developer that attested that she would have removed the use restrictions if the City had simply asked. R.320. This affidavit was suspect and late, and was stricken by the court.⁵ It was obtained by the City in an attempt to convince the trial court to change its decision of six months earlier that the City had breached the Agreement by not being able to convey fee title in the UGA Property. At that time, the UGA had already been evicted and this lawsuit was about to go to trial on the issue of damages.

2. The anticipatory breach of the Agreement by North Salt Lake relieved the UGA of the requirement of a 20 year lease extension.

North Salt Lake argues that the UGA had to agree to a 20 year lease on rent terms

⁵ The court should note that the developer never released the deed restrictions. They exist today. The developer only said that she would.

acceptable to North Salt Lake before it had a duty to convey the UGA Property. North Salt Lake reasons that the UGA had to negotiate with the developer to obtain the UGA Property free and clear of the use restrictions even though the City was obligated to convey fee title to the Property. Transcript of trial testimony of Scott Gardner, North Salt Lake Director of Golf and Recreation, p. 94, R. 565; and testimony of Colin Wood, North Salt Lake City Manager, p. 131, R. 565. When the UGA refused to accept such a lease, North Salt Lake evicted the UGA.

The trial court recognized that North Salt Lake's argument was simply an escape route designed to absolve it from its breach of the Agreement. The trial court reasoned that under certain conditions, an anticipatory breach of a contract excuses the other party from performing conditions precedent, such as entering into a 20 year lease. R. 222. The trial court construed the Agreement to be that North Salt Lake promised unrestricted fee title to an 18,975 square foot lot. R. 222 & 23. North Salt Lake had plenty of opportunity to provide such title, but could not. Id. The UGA demanded such title and stood ready to enter into a 20 year lease. Id. North Salt Lake refused to convey fee title to such a lot because it did not have such title and eventually solved the problem by evicting the UGA. The court concluded that this was an anticipatory breach of the Agreement. Id.

An anticipatory breach will generally excuse the nonoccurrence of a condition precedent. Restatement (Second) of Contracts §§ 245 & 255 (1977); J. Murray, Murray on Contracts § 188, p. 366-67; “[i]f, when the time for the happening of a condition precedent arrives, it appears that the promise that is qualified by the condition cannot be performed by

the promisor, the general rule is that the condition is excused . . . If it is reasonably certain that the promisee will not receive that which is the contemplated exchange for the performance of the condition, there is every reason why he should not be required to perform the condition as a preliminary to the recovery of compensation for defeated expectations . . .” Since the UGA stood ready and willing to enter into a 20 year lease extension, and since North Salt Lake refused to enter into the lease and thereafter evicted the UGA, the fact that the lease extension was not agreed to does not act as a condition precedent barring the UGA from seeking damages for its loss of the UGA Property. R. 223 & 24.

3. The Second Addendum was an unenforceable agreement to agree.

Even if a 20 year extension of the lease had to be in place before North Salt Lake had a duty to convey the lot, the terms of the 20 year extension would have been governed by the First Addendum which set out the exact amount of rent that was to be paid during the 20 years. R.28. The second addendum, which allowed North Salt Lake to dictate the critical term of the amount of the monthly rent, was an unenforceable agreement to agree. Pingree v. The Continental Group of Utah, Inc., 558 P.2d 1317, 1321 (Utah 1976); Cottonwood Mall Co. v. Sine, 767 P.2d 499, 502 (Utah 1988); and Browns Shoe Fit Co. v. Olch, 955 P.2d 357, 364 (Utah App. 1998).

North Salt Lake argues that since the 20 year lease was a condition precedent, the trial court only needed to determine if the condition precedent had been met. North Salt Lake reasons that the Pingree line of cases does not invalidate the Second Addendum because the court did not need to fashion a lease agreement for the parties even though the critical terms

of the lease agreement, such as the amount of rent, were missing from the Second Addendum. North Salt Lake concludes that the terms of the 20 year lease were unimportant, that the UGA simply had to enter into a lease on such terms that North Salt Lake dictated. North Salt Lake supports this conclusion by several cases from other states that hold that a clause requiring one party to be “satisfied” with a required condition precedent is enforceable and not an illusory agreement to agree.⁶

The requirement of a 20 year extension in the Second Addendum was not a “satisfaction” requirement. It required the UGA to agree to whatever rent that North Salt Lake wanted to charge for the 20 year extension of the lease. This would have given North Salt Lake the unilateral power to frustrate the UGA’s right to the building lot by negotiating an excessive rent and would have effectively terminated the lease. Courts will construe contracts so that one party does not have such an unilateral right of termination. Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028, 1037 (Utah 1985).

In addition, the “satisfaction” line of cases cited by North Salt Lake would require the trial court to determine if the City was being reasonable in its determination of whether the condition precedent had been met. This meant that the court would have to investigate whether North Salt Lake was asking a reasonable rent for the 20 year extension of the lease. In doing so, the trial court would run head on into the prohibition of the Pingree line of cases

⁶ These cases are Mattei v. Hopper, 330 P.2d 625 (Cal. 1958); Western Hills, Oregon, Ltd v. Pfau, 508 P.2d 201 (Or. 1973); and Omni Group, Inc. v. Seattle First Nat’l Bank, 645 P. 2d 727 (Wash. Ct. App. 1982).

and be required to determine the dollar amount of “reasonable rent.” The Second Addendum was simply an unenforceable agreement to agree.⁷

4. The UGA timely elected a 20 year lease and was precluded from entering into such a lease by the actions of North Salt Lake.

North Salt Lake argues that if the Second Addendum was not enforceable, the UGA failed to strictly abide by the terms of the First Addendum by entering into a 20 year lease extension at a set rate of rent before the original period of the Agreement expired. The City reasons that it had no duty to convey the building lot until this election was made and the UGA did not make the election before the original period of the lease expired. There are several problems with this argument.

a. The UGA elected the 20 year lease extension but was precluded from completing the extension of the lease by the actions of North Salt Lake.

Before the initial period of the lease expired, the parties discovered that North Salt

⁷ Since the Second Addendum was unenforceable, the court should fall back to the First Addendum and use the set rent from that agreement in place of the unenforceable term of the Second Addendum. Corbin discusses this doctrine that if a subsequent contract is void, or voided, because of fraud, infancy, or other reasons making the contract unenforceable, the prior agreement, that does not have the defect, becomes enforceable. Corbin on Contracts, § 1293 (1999 Cum Supp.). See also 17 Am. Jur. 2d *Contracts* § 513; Indiana Flooring Co. v. Grand Rapids Trust Co., 20 F.2d 63, 65 (6th Cir. 1927); Timely Products, Inc. v. Costanzo, 465 F.Supp. 91, 98 (D.Conn. 1979); Spellman v. Ruhde, 137 N.W.2d 425, 428 (Wis. 1965); and Travelers Insurance Company v. Carey, 180 N.W.2d 68, 72 (Mich. Ct. of App. 1970).

This concept was discussed by the Utah Court of Appeals in Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285, 291 & 293 (Utah App. 1994). In Won-Door, the Court of Appeals replaced the unenforceable agreement with another agreement between the parties that addressed the same subject since the other agreement was a valid and enforceable contract.

Lake could not perform the most important term of the 20 year extension and convey fee title in the building lot. R. 527 and letters between the parties, trial exhibits 7 - 13. Before the expiration of the initial term of the lease, the UGA made it clear that it wanted the UGA Property and was ready and willing to sign a 20 year extension. R. 527. Because of the problem caused by North Salt Lake's inability to convey the fee title in the Property, the parties entered into negotiations. R. 527. During these negotiations, the UGA advised North Salt Lake that it stood willing and ready to sign a 20 year extension for the rent provided in the First Addendum and that it expected the City to convey the building lot. R. 527 and UGA letter of December 8, 1999, trial exhibit 13. North Salt Lake responded by evicting the UGA. R. 528 and eviction notice, trial exhibit 15.

b. The anticipatory breach of North Salt Lake precluded the need of the UGA to execute such an extension.

The argument that North Salt Lake did not need to convey the UGA Property because the UGA did not execute a twenty year extension ignores the fact that an important part of the consideration for the twenty year lease was the right to the UGA Property. The UGA was absolved from entering into the lease because of the anticipatory breach of North Salt Lake, as argued above.

c. North Salt Lake's argument was raised for the first time on appeal.

The argument that the UGA did not execute a 20 year lease extension within the time requirements of the agreement is raised for the first time on appeal. North Salt Lake is precluded from making this argument. State v. Emmett, 839 P.2d 781, 783-84 (Utah 1992); and State v. Matsamas, 808 P.2d 1948, 1052-53 (Utah 1991).

F. The Trial Court did not Err in its Calculation of Damages.

The trial court awarded the UGA the value of the UGA Property that was lost when North Salt Lake could not convey fee title in the Property. This value was \$158,441.00. North Salt Lake argues that the court should have deducted the present value of the 20 years of lease payments that the UGA did not pay to North Salt Lake.

The UGA had the right to a 20 year lease at the rent set in the First Addendum and the right to the UGA building lot. North Salt Lake breached the Agreement by refusing to convey fee title in the building lot, by refusing to enter into a 20 year extension of the lease and by evicting the UGA. The UGA had the right to sue for loss of its expectation of receiving the building lot. The measure of damages for this loss was the fair market value of the lot. The UGA also had the right to sue for the loss of the 20 year extension. The measure of damages for loss of the extension of the lease would have been the difference between what the UGA had to pay for similar replacement offices and what it would have paid North Salt Lake under the lease.

Contrary to the argument of North Salt Lake, the UGA did not receive a windfall by the judgment. The UGA still had to pay rent for its corporate offices, albeit to another landlord because North Salt Lake evicted the UGA. The UGA received the benefit of the building lot only because the trial court awarded a judgment for the fair market value of the lot. This was the very position for which the UGA contracted.

Contrary to the argument of North Salt Lake, it has not had to pay more than it contracted to pay. It paid for the building lot, not by purchasing the lot and conveying it to

the UGA under the contract, but by the judgment awarded against it. It has continued to collect rent for the office space, not from the UGA because of the eviction, but from the other tenants who have moved into the space. This was the very position for which North Salt Lake contracted.⁸

Upon anticipatory breach, a party can treat the contract as broken and sue for damages. Hurwitz v. David K. Richards Co., 436 P.2d at 796. The proper measure of damages for breach of contract is the amount necessary to place the nonbreaching party in as good of a position as if the contract had been performed. Mahmood v. Ross, 990 P.2d 933, 941 (Utah 1999); Alexander v. Brown, 646 P.2d 692, 695 (Utah 1982); and Keller v. Deseret Mortuary Co., 455 P. 2d 197, 198 (Utah 1969). The trial court's award of the \$158,441.00 fair market value of the building lot should be upheld.

G. The Trial Court Erred in Declining to Award the UGA its Costs of Moving After being Evicted by North Salt Lake.

North Salt Lake evicted the UGA even though the UGA stood ready and willing to sign a 20 year lease extension consistent with the terms of the First Addendum. North Salt Lake evicted the UGA because the City could not perform its contractual duty and convey the building lot and the UGA was demanding conveyance of the lot. The eviction breached the UGA's right to a 20 year extension. When it was evicted, the UGA incurred costs and expenses to move its offices. R. 528. These costs and expenses included moving expenses of \$4,087.27, as set forth on the statements from Mesa Moving and Storage and Midwest

⁸ Actually, North Salt Lake is in a better position because it leased the office space to the tenants that replaced the UGA for a higher rate of rent.

Office. Trial exhibit 19. They included the cost of moving the telephone system in the amount of \$2,102.69, which is set forth within the statements from Western Communications. Trial exhibit 19. They also included the cost of printing new stationary, envelopes, cards and other necessary items with a new address for the UGA for \$4,815.53, as set forth in the statements from Production Graphics. Trial exhibit 19.

These costs and expenses total \$11,005.49 and would not have been incurred if the UGA had been allowed to have the benefit of its right to the 20 year extension. In order to put the UGA in the same position that it would have enjoyed had the contract been performed by North Salt Lake, the trial court should have awarded these costs and expenses to the UGA. Alexander v. Brown, 646 P.2d at 695. They were fully supported by testimony, canceled checks and bills from the moving company, telephone company and printer. The existence and amount of the damages were certain and not speculative. The trial court committed error by not awarding these damages.⁹

The reason that the trial court did not award these damages is because it concluded that the UGA had a duty to mitigate its damages by signing a 20 year lease extension without the conveyance of the building lot and then suing North Salt Lake for the value of the lot. R. 443-45. The trial court reached this conclusion even though it also concluded that the City breached a very important obligation under the contract, its duty to convey the building lot.

⁹ The UGA also sought damages for the wages of its employees involved in the moving of the offices and the value of improvements to the offices left behind. The trial court concluded that these damages were speculative and uncertain. The UGA agrees with this conclusion, but does not agree with the conclusion that it failed to mitigate its damages, thus losing its hard costs of moving, such as the cost of the moving company, the telephone company and the printer.

The UGA had no duty to mitigate its damages by negotiating with the developer to convey the building lot without the deed restrictions and by negotiating the additional 1,207 square feet that was never owned by the City. North Salt Lake agreed to convey clear, fee title in an 18,975 square foot lot, not a 17,768 square foot lot with restrictions that made it impossible to resale the lot. North Salt Lake was fully aware of the consequences of its actions caused by its failure to convey the lot and its eviction of the UGA. North Salt Lake had the same opportunity as the UGA to mitigate the damages by negotiating with the developer to obtain clear, fee title in the correct size of lot. North Salt Lake had the same opportunity as the UGA to limit the damages by not evicting the UGA. Yet, the City chose to not negotiate with the developer and chose to evict the UGA. These conscious choices caused the damages of loss of the building lot and the expenses of moving the UGA's offices.

Where the breaching party has the same opportunity to perform the contract and the same knowledge of the consequences of nonperformance as the party to whom the contractual duty is owed, the breaching party cannot complain about the failure of the latter to perform his contractual duty. Alexander v. Brown, 646 P.2d at 695. The UGA had no duty to mitigate the damages of the costs of moving its offices by signing a 20 year lease without the bargained for benefit of clear, fee title in the building lot. The trial court's decision to not award the UGA its \$11,005.49 of moving costs was clear error and the court should reverse this portion of the decision and award these costs, plus interest at the prejudgment and postjudgment rates from the date of the eviction, December, 12, 1999.

Further, mitigation of damages is an affirmative defense. John Call Engineering v. Manti City Corp., 795 P.2d 678, 682 (Utah App. 1990). This defense was not pled in the defendants' answer or raised by motion. The trial court based this portion of its decision on an affirmative defense that was not pled by the defendants or reasonably anticipated by the UGA. This defense should not have been considered. Golding v. Ashley Central Irrigation Co., 793 P.2d at 899.

H. The Court Could Uphold the Decision of the Trial Court Based upon Breach of the Covenant of Good Faith and Fair Dealing.

The UGA also alleged breach of the covenant of good faith and fair dealing in the Complaint. The essence of the covenant of good faith and fair dealing is that every party must act reasonably, not arbitrarily, towards the other party to the contract so as not to deprive the other party of the benefits of the contract. Resource Management Co. v. Weston Ranch and Livestock Co., 706 P.2d at 1037; Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 311 (Utah 1982); and Ted R. Brown Assoc. v. Carnes Corp., 753 P.2d 964, 970 (Utah App. 1988).

North Salt Lake did not act reasonably towards the UGA. The right to the UGA Property was clearly an important part of the agreement between the parties. North Salt Lake represented that it owned the lot in fee title. It did not. When this fact was discovered, North Salt Lake did not act reasonably. It should have obtained the lot from the developer and conveyed the lot to the UGA or paid the fair market value of the lot to the UGA if the developer refused to convey fee title to the lot. At the same time the parties should have

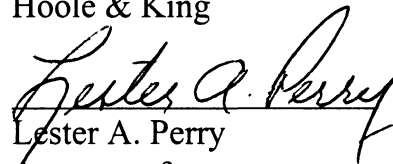
agreed to the twenty year lease extension with the rent increases outlined in the First Addendum. Instead, North Salt Lake refused to deal with the developer, told the UGA that it had to solve the problem with the developer or take the building lot with the lesser square footage and the use restrictions that gutted all of the value from the lot, or face being evicted. When the UGA stood its ground and demanded that North Salt Lake honor its contractual obligations and convey fee title in the lot, the City evicted the UGA. This was not reasonable behavior and destroyed the UGA's right to the building lot and its right to a 20 year lease extension. The court could uphold the decision of the trial court based upon the breach of the covenant of good faith and fair dealing by North Salt Lake.

Conclusion

The Court should uphold the judgment of the trial court in the amount of the fair market value of the building lot, \$158,441.00; modify the judgment by awarding the UGA its \$11,005.49 in moving costs and expenses, plus prejudgment and postjudgment interest from the date of the eviction, December 31, 1999; and remand the case to the trial court to determine the attorney's fees, costs and litigation expenses incurred in this appeal (the written agreements contain attorney fee provisions), which should be added to the judgment.

Dated the 19th day of June, 2002.

Hoole & King



Lester A. Perry

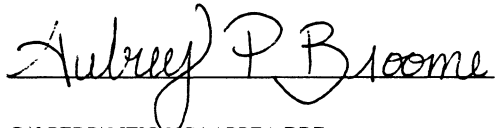
Attorneys for

Plaintiff/Appellee/Cross-Appellant

Certificate of Mailing

I certify that two copies of this brief were mailed to the following on the 24th day of June, 2002.

Larry S. Jenkins #4854
Wood Crapo, LLC.
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Salt Lake City, Utah 84111

A handwritten signature in cursive script that reads "Aubrey P. Boome". The signature is written in dark ink and is positioned above a horizontal line.

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